

CASE AND COMMENT

Jurisdiction and the Enforcement of Cross-Border Arrest Warrants: *R. v. Commissioner of Police of the Metropolis, ex p. Bennett*

If the execution of an English warrant for the arrest of a New Zealand citizen was deemed to be an abuse of process by the English courts in view of the disregard of extradition procedures, is it permissible for the English and Scottish police to execute a Scottish warrant, upheld by the High Court of Justiciary, for the arrest of the same individual in England? And, moreover, does an English court possess the requisite jurisdiction to interfere in the execution of Scottish criminal procedure in England?

These issues were addressed in the case of *R. v. Commissioner of Police of the Metropolis, ex p. Bennett* [1995] 3 All E.R. 248, which featured the redoubtable Paul Bennett, an individual well known to criminal procedure lawyers south of the border due to his attempts to review his committal in England in the Divisional Court (*Bennett v. Horseferry Road Magistrates' Court* [1993] 2 All ER 474) and in the House of Lords (*Bennett v. Horseferry Road Magistrates' Court* [1994] 1 A.C. 42; [1993] 3 W.L.R. 90; [1993] 3 All E.R. 138). Bennett was alleged to have committed fraud in Scotland and various deception offences in England. On November 20, 1989 a warrant for his arrest was issued in Scotland for the fraud offences which had taken place earlier that year in Aberdeenshire. In January 1991, Bennett was seized in South Africa, where he was residing, and taken to England to stand trial for the offences committed there. Bennett challenged these proceedings by judicial review, firstly to the Divisional Court and then to the House of Lords, arguing that the proceedings constituted an abuse of process following the illegal seizure and the deliberate attempt to bypass normal extradition procedures. The House of Lords (Lord Oliver dissenting) held that the High Court could stay the prosecution and order the defendant's release if there had been an abuse of process; to ascertain whether or not such an abuse of process took place, the High Court had the power to look into the circumstances in which the accused had been brought into the jurisdiction. The case was remitted back to the Divisional Court for further consideration and it was decided that, due to the attempt to get around the extradition process and the collusion between the South African and the English authorities, the committal to the Crown Court be quashed and the applicant be discharged from bail.

Bennett also sought to challenge the Scottish warrant on the same basis. The High Court of Justiciary in Scotland, however, took a different view from their English counterparts (*Bennett v. H.M. Advocate*, 1995 S.L.T. 510). On October 18, 1994 the Lord Justice General rejected the argument that there had been collusion between the South African and the English authorities and held accordingly that it would not be an abuse of the process of the Scottish

courts to enforce the warrant. The resultant position was that Bennett was in England, the English courts had held that it would be an abuse of process to enforce the English warrant, yet the Scottish courts had held that the warrant issued in Scotland was lawful. Could the Scottish warrant be enforced in England? Bennett applied once again to the Divisional Court in England seeking an injunction to stop both the Scottish police and the English police from executing the Scottish warrant south of the border, primarily on the basis that by seeking to execute the Scottish warrant, the English court would be committing a further abuse of process as the proceedings in Scotland would be tainted with the same illegality. It is important to note that the relief sought by Bennett was not the staying or setting aside of the Scottish warrant or the prevention of its execution in Scotland; he accepted that the warrant was validly issued by a competent sheriff court in 1989. What was challenged was the execution of this warrant in England.

Before looking at the arguments in the case, it is necessary to examine the statutory provisions relating to the execution of Scottish warrants in England and Wales. Section 15 of the Indictable Offences Act 1848 allowed for the indorsement of a warrant issued in Scotland by an English justice of the peace after which it could be executed south of the border by a Scottish police officer. The procedure was simplified by section 38 of the Criminal Law Act 1977 which provided that a Scottish warrant could be executed by any constable in England and Wales. Furthermore, section 38(4) of the Act removed the requirement that a Scottish warrant had to be indorsed by an English justice of the peace.

In seeking the injunction the applicant contended that, although under article XIX of the Act of Union 1706 "no causes in Scotland be cognoscible by the courts of Chancery Queen's Bench Common Pleas or any other court in Westminster Hall" (it was accepted that the Divisional Court was within the category of courts referred to) and the English courts had "no power to cognosce review or alter the acts or sentences of the judicatures within Scotland or stop the execution of the same", the words "stop the execution of the same" should be construed as meaning the execution of a warrant within Scotland only. Therefore, whilst it would not be an abuse of the process of the Scottish court to enforce the warrant within Scotland in the present case, it would be an abuse of the English court to enforce the same warrant in England. In addition, it was submitted on Bennett's behalf that, having regard to section 18(1) of the Extradition Act 1989, it would be inappropriate that the applicant should be in a worse position, not having been lawfully extradited, than he would have been had the proper procedures been followed. If he had been extradited solely for the English offences, he could not then have been tried in Scotland for the Scottish offences.

Rose L.J. held (with Potts J. concurring) that the words "stop the execution of the same" in article XIX of the 1706 Act were not to be read in such a limited sense. If the Act had been intended to be confined to execution in

Scotland, it would have stated so categorically. The fact that it did not, made it clear that it was not open to an English court to intervene or impede the execution of Scottish process. Moreover, the submission on extradition was similarly dismissed on the ground that had the applicant been lawfully extradited for trial in the United Kingdom, he would without doubt have been extradited not only for the offences committed in England but also for those committed in Scotland.

It is apparent from this ruling that although an English court has the power to inquire into the circumstances under which a person has been brought into its jurisdiction (*Bennett v. Horseferry Road Magistrates' Court* [1994] 1 A.C. 42; [1993] 3 W.L.R. 90; [1993] 3 All E.R. 138), it does not have the power to interfere or trespass in the execution of Scottish process whether in Scotland or in England. It follows that the arrest of an individual pursuant to a Scottish warrant cannot amount to an abuse of the process of an English court, which has jurisdiction only over abuses of its own trial process. Therefore, in respect of the present case, it is only the Scottish process which could have been tainted or degraded as a result of the improper extradition procedure employed. However, on this point, the High Court of Justiciary had already ruled that the South African authorities had merely sought to deport the applicant from South Africa to New Zealand for repatriation. His transfer via London was not deemed to be an elaborate ploy conjured up by the English and South African authorities to justify the applicant's arrival in the United Kingdom. As such, the High Court of Justiciary concluded that the Lord Advocate was correct in deciding that there were no grounds for restraining the warrant and the process was in no way tainted or improper.

Rose L.J. and Potts J. appear to have properly construed the true intention of the 1706 Act, the framework of which embodied the idea of two separate legal systems operating on a detached but equal footing. The Act, and its subsequent interpretation in the present case, allow for the proper execution of the Scottish legal process without any interference or interruption from an English court. This is also consistent with the statutory provisions relating to the execution of a Scottish warrant south of the border which recognise both the independence of Scottish and English criminal procedure and the need for a system which allows for the efficient execution of cross-border arrest warrants. It is our contention that it is correct as a matter of principle that neither the Scottish or English police should be restrained from executing a Scottish warrant in England by an English court.

GAVIN DINGWALL AND SHANE KILCOMMINS
UNIVERSITY OF WALES, ABERYSTWYTH

Keeping the Price and the Property: *Sharp v. Thomson*

The Inner House of the Court of Session refused the appeal in *Sharp v. Thomson* on May 4, 1995 (1995 S.L.T. 837). While many may respect the

legal reasoning behind at least a part of the decision, there is a general feeling that the result is itself unfair. This view was echoed by the Lord President in his judgment when he indicated clearly that the result was "unsatisfactory". The case is now to be appealed to the House of Lords.

The facts of the case will now be well known. A building company granted a floating charge in favour of the Bank of Scotland covering its whole property from time to time. By missives concluded in May 1989 the company sold a basement flat to the defenders. The price was paid and entry was taken on June 12, 1989. On August 9, 1990 a disposition in favour of the defenders was executed and delivered along with a deed of restriction by the Bank of Scotland relative to a standard security which they held. A certificate of non-crystallisation relative to the floating charge had been signed by the Bank on June 8, 1989. A similar certificate could have been provided to the purchasers if it had been requested in 1990. No such certificate was delivered to the purchasers and on August 10, 1990 the pursuers were appointed joint receivers of the company by the Bank of Scotland. The disposition was recorded in the Register of Sasines on August 21, 1990. Put shortly, the question was whether the crystallisation of the floating charge gave the receivers a priority over the purchasers. Lord Penrose in the Outer House held that the receivers took priority because on crystallisation the floating charge was deemed to be a fixed security over the property in terms of section 53 (7) of the Insolvency Act 1986. The Inner House upheld this decision with no dissent.

There are really two aspects to the decision. There is the question of what rights a purchaser obtains to heritable property on delivery of the disposition and the question of what property falls within the property and undertaking of a company for the purposes of a floating charge. There has always been an academic debate over the first of these issues. It is generally accepted that a purchaser under missives but with no delivered or recorded disposition has a *jus crediti* against the seller and nothing more (*Gibson v. Hunter Home Designs Ltd.*, 1976 S.C. 23; 1976 S.L.T. 94). When a disposition is delivered, however, the seller puts it outwith his own power to stop the purchaser recording or registering a title and, although it has been accepted that the *jus in re* only arises on recording or registration, there has been a view that delivery results in a proprietary right. This proprietary right was classified as a *jus ad rem*. Counsel for the appellants argued that delivery of the disposition to the purchasers' solicitors gave the purchasers a proprietary right and accordingly the floating charge did not attach. Counsel relied heavily on the dictum of Lord President Emslie in *Gibson v. Hunter Home Designs* (1976 S.C. at 27; 1976 S.L.T. at 96). In that case the Lord President stated: "On delivery of the disposition the purchaser becomes vested in a personal right to the subjects in question and his acquisition of a real right to the subjects is dependent upon recording the disposition in the appropriate Register of Sasines. . . . Until the moment of delivery the purchaser, even if he has paid the price and obtained occupation of the subjects, has no more than